

1 IN THE UNITED STATES DISTRICT COURT
2 IN AND FOR THE DISTRICT OF DELAWARE

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4 MCKESSON AUTOMATION, INC., : CIVIL ACTION NO.
5 a Pennsylvania Corporation, :
6 Plaintiff, :
7 v :
8 SWISSLOG HOLDING AG, :
9 SWISSLOG MANAGEMENT AG, :
10 TRANSLOGIC CORPORATION, and :
11 SWISSLOG NORTH AMERICA, :
12 : 06-28 (SLR-LPS)
13 Defendants.

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1 APPEARANCES: (Continued)

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MORRIS NICHOLS ARSHT & TUNNELL, LLP
BY: JULIA HEANEY, ESQ.

5

and

6

7

DICKSTEIN SHAPIRO MORIN & OSHINSKY, LLP
BY: ALFRED R. FABRICANT, ESQ.
(New York, New York)

8

Counsel for Defendants

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15

P R O C E E D I N G S

16

(REPORTER'S NOTE: The following telephone

17

conference was held in chambers, beginning at 11:00 a.m.)

18

THE COURT: Good morning. Are counsel there?

19

Hello? Anybody there?

20

MR. FABRICANT: Yes.

21

MS HEANEY: Good morning.

22

THE COURT: This is Judge Stark. Let me know

23

who is on the line, please.

24

MS. HEANEY: Your Honor, this is Julie Heaney

25

for defendants; and Fred Fabricant is also on.

1 THE COURT: Okay.

2 MR. JACOBS: Your Honor, on behalf of McKesson
3 Blair Jacobs and Christina Ondrick is also on the line.

4 THE COURT: Okay. Good morning to you, all.

5 (The attorneys respond, "good morning.")

6 THE COURT: So I have received the letters that
7 I had ordered following our hearing the other day.

8 A VOICE: Joining conference, Christine Azar.

9 MS. AZAR: Good morning. This is Christine Azar
10 from Blank Rome.

11 THE COURT: Okay. This is Judge Stark.

12 MS. AZAR: Good morning, Your Honor.

13 THE COURT: Thanks for joining us. Are we
14 expecting anybody else?

15 MR. JACOBS: I think that is all, Your Honor.

16 THE COURT: Okay. All right. So I was just
17 saying I've seen the letters; and in terms of how this
18 dispute will be resolved, I mean it does fall kind of in
19 between the parts of the case that are with Judge Robinson
20 and the parts that are with me since it relates to claim
21 construction which is with Judge Robinson, it relates to
22 scheduling which is with Judge Robinson, but it may have an
23 impact on discovery which is in front of me. So I'm still
24 not entirely clear on how and when you are going to get a
25 final decision on this dispute, but I want to make sure that

1 I understand the dispute in full and make sure that there is
2 no chance of working out an accommodation.

3 I take it -- well, let me ask you, Mr. Jacobs,
4 when we left the other day, you at least seemed somewhat
5 hopeful there might be some further efforts to try to
6 resolve this dispute. I take it there were efforts but they
7 failed; is that correct?

8 MR. JACOBS: That is correct, Your Honor. We
9 have essentially offered to amend the order, scheduling
10 order with regard to these specific allegations and to allow
11 the defendants any time they need to respond, amend expert
12 reports and things of that nature and also, if necessary, to
13 amend deposition dates with regard to these specific
14 allegations. And we received a response back indicating
15 that, you know, because of the complexity I suppose of the
16 issue, they did not believe that a scheduling amendment
17 would work here.

18 THE COURT: Okay.

19 MR. FABRICANT: Your Honor, this is
20 Mr. Fabricant.

21 THE COURT: Yes.

22 MR. FABRICANT: I guess the real issue here is
23 that from the day the lawsuit started two or more years
24 ago, the brochures were available on the website which
25 indicated this issue which disclosed that, you know, how

1 these products worked and gave the information that if they
2 believe this was an infringing product to one of their
3 claims, they could have asserted it. There were numerous
4 depositions, including the two that we've cited in our
5 letter which support that. There are lots of documents
6 which were produced to the plaintiff at a very early stage
7 which provides this information. And the additional claims
8 now being asserted, you know, do add a significant amount of
9 work which would need to be done. If this had happened at
10 an earlier stage of the litigation, I'm sure the Court would
11 have a much easier time allowing that to be added. But at
12 this stage, in light of the fact that really from the day
13 the case was filed, all this information was available and
14 then was subsequently provided.

15 In fact, during the Youtz deposition, he was the
16 product manager and not only did he provide the testimony
17 that was included in the letter that we submitted the other
18 day, in their letter response, they basically were saying,
19 well, yes, he gave that testimony but it really didn't
20 address the issue of whether it was offered for sale or was
21 a product available at that time.

22 Mr. Youtz further testified specifically in his
23 deposition conducted in May of '08, at Page 246. He was
24 specifically asked:

25 "Question: Have you encountered a hospital that

1 has told you that it would be interested in the PillPick
2 system but not the PickRing?

3 And he answered:

4 "Answer: Yes.

5 "Question: And in that instance, is that when
6 you offered the FillBox? Offered it?

7 "Answer: Yes."

8 So it's not just this recent sale to Heartland.
9 It was the subject of clear testimony dating back as early
10 as May by the product manager himself.

11 THE COURT: Okay. Hold on. Let me stop you
12 there.

13 Mr. Jacobs, let's have you address first the
14 point of you say that I think you initially had some of
15 these terms as your claim construction terms or terms that
16 might be in dispute but then you withdrew them in good faith
17 and now you want to add them back. Help me understand that
18 sort of history and why the initial withdrawal was in good
19 faith and why now you should be allowed to do it.

20 MR. JACOBS: That is fine, Your Honor. And Ms.
21 Ondrick can jump in if I miss something.

22 Essentially, Your Honor, I understand what
23 Mr. Fabricant is saying with regard to the product manager.
24 And we do recall that testimony. There was a corporate
25 witness who testified on behalf of Translogic/Swisslog who

1 contradicted that testimony. And after the corporate and
2 30(b)(6) testimony, we decided that we did not have, based
3 on that corporate testimony, any type of good faith basis
4 for keeping these claims in this case any further.

5 After that, subsequent to that, we received the
6 expert report of Mr. Stec. And he provided additional
7 information kind of corroborating what Mr. Youtz had said
8 but contradictory to what the 30(b)(6) witness had said.
9 And at that point in time we said okay, you know, now, out
10 of an abundance of caution, let's put these back in again
11 because now it appears they have given the information to
12 this expert for him to, with a good faith basis, conclude
13 that these features are there. And, Your Honor, we're
14 dealing essentially with a modification, a FillBox
15 modification, a conveyor belt essentially at the back end
16 of the product.

17 We have asked the defendants on a couple of
18 different occasions for the factual basis of their claim
19 this would take significant amounts of expert time because,
20 you know, we've all done this many times. We've been on
21 both of the plaintiff and defendant side. And from our
22 perspective, we're looking at a fairly quick modification
23 on the invalidity side. This is not going to take a lot of
24 work. We thought a couple of weeks easily would address
25 this. We just don't see it as being a significant amount

1 of time, as they're contending. We asked a couple times
2 why it would take a significant amount of time and have not
3 received a response to that.

4 THE COURT: We'll get a response in a second,
5 but first respond to articulate what the prejudice to you is
6 if we don't allow you to add these claims at this point in
7 the case.

8 MR. JACOBS: The prejudice is that we were
9 relying on the corporate testimony, the 30(b)(6) testimony
10 of their witness when we withdrew. As soon as we received
11 knowledge that these features were in fact present, we
12 initiated contact with opposing counsel, there was not a
13 significant delay, and asked if we could bring these claims
14 back in again. They're dependent claims that already
15 relate to independent claims that are in the case. The
16 prejudice is that we will have no way that we'll be able
17 to assert these claims that we should rightly be able to
18 assert.

19 THE COURT: Okay.

20 MR. FABRICANT: Your Honor, if I can address
21 the 30(b)(6) issue for a moment?

22 THE COURT: Yes, address that, and then
23 articulate for me with specificity your contention that this
24 will throw off every date and, you know, basically "the sky
25 is falling" if we add these claims into the case.

1 MR. FABRICANT: Yes, Your Honor. On the
2 30(b)(6) issue, there is a very clear answer, and that is
3 as follows:

4 There are two defendants in the case, Your
5 Honor. There is Swisslog Italia, the manufacturer in Italy,
6 and there is Translogic, the company in the United States
7 that offers the product for sale. The Swisslog Italia
8 company has nothing to do with offering the products for
9 sale in the United States, only with selling the product to
10 the American company.

11 The witness which Mr. Jacobs talks about here,
12 Mr. Davolio, was a 30(b)(6) witness only for Swisslog
13 Italia. He has no relationship with Translogic, the
14 American company. He had nothing to do with offering
15 products for sale; and he was not designated under 30(b)(6)
16 on the subject of what products are offered for sale in the
17 United States. Rather, he was offered on the subject of how
18 the system is set up, and how the products work together,
19 not even addressing the issue of what product are offered
20 for sale in the United States -- a subject which was
21 covered not only by the Translogic witnesses, Mr. Youtz
22 and Mr. Hinnen, the sales manager and the product manager,
23 but also by every brochure, by the website, by all of
24 the documents, all the of the things within McKesson's
25 possession literally from the day the case started.

1 THE COURT: Let me stop you at that point.

2 Mr. Jacobs, what was your response that it was a
3 30(b)(6) for the wrong entity?

4 MR. FABRICANT: Absolutely, Your Honor.
5 30(b)(6), he was the lead engineer for the entity that
6 made the product. Mr. Fabricant talked about offered for
7 sale. Remember that the patent act covers as acts of
8 infringement anything made, used or sold. And certainly if
9 this product were used in the United States and it did not
10 have the features that were described by this lead engineer,
11 at that point in time, and he is saying it doesn't have
12 these certain features, we have to conclude, based on that
13 testimony, that we cannot maintain those claims in the case
14 because it's not being made, used or sold in the United
15 States.

16 Then we get testimony from somebody else in an
17 expert report subsequent to that indicating, oh, in fact,
18 it is being made, used or sold in the United States. So
19 we're not just looking at offered for sale. We were looking
20 at what this individual said, what features were part of
21 the product when it was actually made in Italy and, our
22 understanding is, shipped to the United States for eventual
23 sale.

24 THE COURT: Let me get some dates here, if
25 either of you have them. The witnesses that we're

1 discussing are Davolio and Youtz; is that correct?

2 MR. FABRICANT: And Hinnen.

3 MR. JACOBS: Yes, and Mr. Hinnen.

4 MR. FABRICANT: And I think I should point out,
5 Your Honor, what we're referring to here as the new evidence
6 which gave this change to the McKesson company was two lines
7 in the Stec report -- which is the damages expert, not the
8 technical expert -- the damages expert who, in reference in
9 the historical portion of his report, referenced a brochure
10 on the website of Translogic.

11 THE COURT: Okay. Here is what I want to know.
12 Davolio, that was the 30(b)(6) witness for Swisslog Italia;
13 is that correct?

14 MR. FABRICANT: Yes, Your Honor.

15 THE COURT: That's the one, Mr. Jacobs, you are
16 saying you relied on in withdrawing your claims; is that
17 correct?

18 MR. JACOBS: That is correct, Your Honor.

19 THE COURT: Do we know what the date of Mr. or
20 Ms. Davolio's testimony is?

21 MS. ONDRICK: I can give you that information,
22 Your Honor. Mr. Davolio's deposition was May 23rd and 24th
23 of 2007.

24 THE COURT: Okay. Was that Ms. Ondrick?

25 MS. ONDRICK: Yes, this is Ms. Ondrick.

1 THE COURT: Okay. Thank you.

2 And now Youtz. Again, what kind of witness was
3 and is he?

4 MR. FABRICANT: Yes. Mr. Youtz was the product
5 manager for the very product in question from Translogic in
6 the United States; and we believe his deposition was taken
7 actually within a short number of weeks after Davolio. It
8 was in June. We believe it was in June of 2007.

9 MS. ONDRICK: Actually, that was --

10 MR. FABRICANT: Or May. I'm sorry.

11 MS. ONDRICK: That's correct, Your Honor.
12 May 3rd.

13 MR. FABRICANT: May 3rd. So it was before
14 Davolio. Right.

15 MS. ONDRICK: It was before Davolio. And it
16 was an individual witness's testimony, it wasn't 30(b)(6)
17 testimony.

18 THE COURT: Right. And who is Hinnen?

19 MR. FABRICANT: Hinnen was the sales manager for
20 the product in the United States.

21 MR. JACOBS: And that was well before the
22 Davolio deposition. Do we have that date, Christina?

23 MS. ONDRICK: Yes. That was November 8th and
24 9th of 2006.

25 MR. FABRICANT: So, Your Honor, it's clear then

1 that two of the depositions that we're talking about of the
2 Translogic entity that actually makes, that uses and sells
3 this product in the U.S. have made clear by those people who
4 were the most familiar with the product that it was being
5 offered for sale in the U.S., and that if they had a claim
6 of infringement they could assert it.

7 MR. JACOBS: And, Your Honor, you see the
8 contradiction that we have. The guy who makes it said it
9 didn't have these features, and he said it after.

10 THE COURT: But let me ask you --

11 MS. ONDRICK: Your Honor, just so it's very
12 clear, it's that product -- a product of the type we are now
13 alleging infringes -- the way Mr. Davolio's deposition
14 testimony reads out is that that product doesn't exist. So
15 I don't understand how they could offer a product that he
16 said doesn't exist.

17 MR. FABRICANT: Your Honor, there is one other
18 thing I would like to add. Mr. Davolio also at his
19 deposition testified that he was -- that the pillbox product
20 was designed and developed without his participation. That
21 it happened after he had become only a consultant to the
22 company and that he only had a high level of understanding
23 of what its functionality was.

24 THE COURT: And Mr. Jacobs or Ms. Ondrick,
25 the claim terms that you want to add in, were they all

1 originally at issue? And, if so, on what date did you
2 withdraw them from being at issue?

3 MS. ONDRICK: Yes, Your Honor. This is
4 Christina Ondrick. They were originally at issue, and we
5 asserted them when --

6 MR. JACOBS: When did we withdraw them,
7 Christina?

8 MS. ONDRICK: We withdrew them on January 31st,
9 2008, at the close of fact discovery.

10 THE COURT: And why did it take from the
11 May 2007 deposition of Davolio until January of '08 to
12 withdraw them?

13 MS. ONDRICK: Your Honor, we were assessing all
14 of our contentions at that time, and we wanted to supplement
15 what we had to make sure it was accurate and accurately
16 reflected what was there. And we did that at the close of
17 discovery so we weren't proceeding in the case with, you
18 know, assertions that we shouldn't be raising.

19 THE COURT: And was there any back and forth
20 or, you know, is there any record of any communications
21 between the parties about the situation that the plaintiffs
22 evidently found yourselves in, which was arguably there was
23 a basis for keeping these claims at issue based on the Youtz
24 and Hinnen testimony but that seemed contradicted by the
25 Davolio testimony. And so I guess my question is did you

1 just unilaterally decide to rely on Davolio despite the
2 contradiction or inconsistency or was there any discussion
3 or back and forth about the bind that you may have been in?

4 MS. ONDRICK: No, Your Honor. We did not go
5 back and forth with them. We did not see this as
6 contradictory or a bind at the time the information we had
7 looked at led us to believe that it was not being offered
8 for sale in the particular configuration that we now
9 understand to be offered for sale.

10 THE COURT: Help me understand how you reached
11 that conclusion if, just three weeks earlier, you had the
12 Youtz testimony, the product manager for the company in the
13 United States distributing the product, which I'm being
14 told, at least, was evidence that the product was being
15 distributed.

16 MS. ONDRICK: Well, the product wasn't being
17 distributed and it had never been sold in the United States.
18 It was our understanding that the only configuration that
19 they could have offered was the configuration where it was
20 inline in the system after the PickRing, not in a situation
21 where it existed without the PickRing. And it seemed to
22 us -- and this is sort of I think speculation -- but at
23 that point, this product is so close in this alternative
24 configuration for infringement, it has become clear that
25 that, you know, is really why I think they're making this

1 argument for refusing to provide us with any kind of
2 deadline to extend discovery.

3 THE COURT: Well, let me turn to that.
4 Mr. Fabricant.

5 MR. FABRICANT: Yes.

6 THE COURT: I had cut you off earlier, but
7 explain to me or persuade me that, whether it's fair or not
8 on its own face, to let them have these terms at this point,
9 I want to focus now on what impact would it have on the
10 schedule if I did allow them to add it back. So articulate
11 that for me. Specifically, which dates would have to be
12 changed, and how much, and why?

13 MR. FABRICANT: Well, Your Honor, what it
14 involves from a work standpoint is having -- first of
15 all, doing additional searches of the prior art to try to
16 determine whether there is prior art that reads on the
17 additional claims which are now being asserted with respect
18 to this configuration. It was withdrawn and was not
19 something which we focused on as a result of having been
20 withdrawn.

21 We would need to obviously to consult with
22 the expert witness who was testifying on the subject of
23 invalidity so that that witness could evaluate the prior
24 art, the relevant art and amend and modify their expert
25 report on the subject of these additional claims.

1 We would also need to evaluate the infringement
2 aspect of the non-infringement of the additional claims. We
3 would have to work with the expert, obviously, to have the
4 expert consider and evaluate the non-infringement position
5 of the additional claims.

6 And then, of course, once we made those
7 modifications and amendments, the McKesson expert no doubt
8 would have to respond to the additional changes and
9 modifications made by our experts.

10 THE COURT: But it would only affect expert
11 discovery; right? There wouldn't be reopening fact
12 discovery since these claims were at issue until the last
13 day of fact discovery; correct?

14 MR. FABRICANT: That's correct. We would have,
15 certainly, no intention of reopening fact discovery on that
16 point.

17 MR. JACOBS: Nor would McKesson.

18 THE COURT: Right. Mr. Fabricant, why isn't an
19 extra three-weeks-or-so about the magnitude of time that
20 might need to be added to the expert process?

21 MR. FABRICANT: Well, if there had to be
22 additional time, I think, you know, perhaps 30 days would
23 be appropriate. I mean, first of all, searching for prior
24 art, meeting with the expert. Our expert on this subject
25 is in California. You know, he is a professor in college.

1 We have to get time when he is available. So I mean it's
2 not always easy to work within a short period of time.

3 I think also the prejudice should be viewed in
4 light of the fact -- the comment that was made about this
5 product being offered for sale. The testimony is without
6 question clear that the product was offered for sale, was
7 in our brochures, was on our website. Mr. Youtz testified
8 to that. This was obviously a very considered analysis that
9 McKesson did from the spring of 2007 until January '08,
10 after which they made an intelligent decision based on all
11 the deposition transcripts, all the documents, that there
12 was no basis for asserting these claims.

13 Now we're being put in the position -- and I
14 think this is part of the prejudice -- even if we're allowed
15 an additional period of time, we're now being put in the
16 position as a result of their about-face, after having
17 months and months to consider this, of having to address
18 these additional -- you know, this is five additional
19 claims in a patent lawsuit, which will make the case more
20 complicated, will make the trial longer, will make the cost
21 greater, will take more of the Court's time at trial, will
22 make Markman more complex, will make the Markman briefs
23 longer. I mean it adds to the complexity and the cost and
24 burden of the case.

25 THE COURT: Mr. Jacobs or Ms. --

1 MR. FABRICANT: And, Your Honor, I'm sorry. One
2 other thing, which I think is perhaps the most important
3 from our standpoint. I think it's unfair to allow a
4 plaintiff to wait until it has our expert report on
5 invalidity, have it for a month, for a solid month, to have
6 an opportunity to evaluate our expert report on invalidity
7 and to see the strengths of our invalidity arguments on the
8 asserted claims and then, one month after having the benefit
9 of that report and analysis and having the opportunity to
10 meet with their own expert, to discuss it, to say: You know
11 something? We think we'd better add some additional claims
12 here. Perhaps we have some problems.

13 To now go back and redesign the case around our
14 expert report on invalidity, I don't think that is what the
15 rules were meant to provide, nor the scheduling order meant
16 to provide; to allow one party an unfair advantage to view
17 the other side's expert report on invalidity and then being
18 given an additional opportunity to change its entire case.
19 And I think perhaps that is our strongest argument.

20 THE COURT: Thank you. And I did want to turn
21 to that. Mr. Jacobs or Ms. Ondrick, it seems to me if fact
22 discovery was closed on January 31st, 2008, whatever you
23 learned in the expert report, it's not in the nature of
24 factual evidence, it's an expert opinion. So help me
25 understand not just the arguable unfairness as Mr. Fabricant

1 points out but how can you in fact learn something factual
2 about this case from an expert that you shouldn't have
3 been able to figure out on your own based on the factual
4 record that was established during fact discovery.

5 MR. JACOBS: I'll handle that, Christina.

6 Your Honor, what happened was Mr. Stec met with
7 individuals relating to specific configurations that were
8 being offered by Translogic. So he was provided, and he
9 represents in his report that he was provided, certain
10 factual information that allowed him to draw his conclusion.
11 This is one of those conclusions that he indicates was
12 based on factual information that was provided to him.
13 This information regarding this particular configuration
14 is also contradictory to the last piece of information that
15 we had on the record from Mr. Davolio relating to this.

16 So at that point in time, we needed to
17 reevaluate the factual nature of whether this configuration
18 was being offered. And if it is being offered, Your Honor,
19 then we have a good faith basis for bringing these claims
20 into the case.

21 And so, you know, oftentimes experts would
22 speak to people and are provided information, see documents
23 perhaps that haven't even been provided during the course
24 of discovery. They then testify based on that factual
25 information, and that factual information is something that

1 you can then examine and have your experts look further at.
2 This has nothing to do with their invalidity contentions.

3 We had our expert look at this factual statement
4 in light of the fact that it changed our knowledge of the
5 configuration that was being offered based on the testimony
6 of Mr. Davolio, the corporate testimony. He looked at it
7 and said you can assert infringement of these claims based
8 on this factual information.

9 And with regard to the invalidity contentions,
10 remember, Your Honor, these claims were in the case and the
11 defendants had already filed invalidity contentions in the
12 case on a couple of different occasions and so certainly
13 they have already done a prior art since they've already
14 looked at this. This is already out there. We didn't
15 withdraw this until the end of fact discovery.

16 THE COURT: Right. Well, the last thing I need
17 to hear from both sides is tell me, there was some allusion
18 to kind of the urgency of this issue. I want to understand
19 what dates are we pressing up against right now? That is,
20 say, in the next two weeks to 30 days? Mr. Fabricant.

21 MR. FABRICANT: Yes, Your Honor. Well, the
22 first dates that come up are the dates for our rebuttal
23 report to the expert report submitted by McKesson on
24 infringement, so we have to address non-infringement, and
25 that I believe is May 28th?

1 MR. JACOBS: Yes.

2 MR. FABRICANT: But that right now is May 28th,
3 Your Honor.

4 And then, of course, we would have to modify the
5 invalidity report. And those dates are the dates by which
6 the dates for the Markman briefs and summary judgment briefs
7 have been set. So that when the dates were set by Judge
8 Robinson for when the claim construction briefs and summary
9 judgment briefs would be due, it was based on when these
10 reports would be finished and also when the depositions of
11 the experts, based on those report dates, would be
12 concluded.

13 I believe right now the schedule provides
14 that the dates for the conclusion of the expert depositions
15 is at the end of June. So it obviously has a ripple effect
16 on the dates for the expert reports, the dates for the
17 conclusion of the expert depositions, and then the dates
18 for the submission of the opening briefs on summary judgment
19 and Markman.

20 THE COURT: And I believe that briefing date is
21 September 10th. Does that look right to you?

22 MR. JACOBS: That is right, Your Honor. We
23 built in a pretty big gap there. We actually negotiated
24 with the defendants a schedule and we built in a pretty big
25 gap in case there were any necessary changes during the

1 summer time frame, and based upon the representation of both
2 parties that there was some vacations going on in the summer
3 as well. So there is plenty of time in there to add a
4 little bit of additional time and to cure any potential
5 prejudice that might be here and to still keep things at the
6 tail end on track.

7 THE COURT: Is it only defendants that have a
8 report due on May 28th?

9 MR. JACOBS: That is everybody that is doing a
10 rebuttal to an issue which they did not bear the burden
11 originally, Your Honor.

12 THE COURT: Okay.

13 MR. JACOBS: But we had agreed, Your Honor, that
14 we certainly did not expect them to respond or address these
15 contentions in that, you know, May 28th rebuttal and that we
16 would give them additional time to supplement. If the Court
17 decided that these claims were permitted to come into the
18 case, certainly, we would give them additional time to allow
19 their experts to address that.

20 THE COURT: Okay. Mr. Fabricant.

21 MR. FABRICANT: Yes. Could I?

22 THE COURT: Yes.

23 MR. FABRICANT: I'm sorry. Could I add one
24 thing to the record, Your Honor? I have the document in
25 front of me now, so one sentence that I would like to read

1 into the record?

2 THE COURT: Go ahead.

3 MR. FABRICANT: And that is from the Stec report
4 that created this entire issue. That is our damages expert
5 report. There was actually one sentence in his very lengthy
6 report which had anything to do with this issue, and it read
7 as follows:

8 The FillBox component is used to load unit doses
9 without the PickRing into patient specific compartments or
10 dedicated ward and pharmaceutical bins, footnote 40.

11 And footnote 40 reads: A reference to Swisslog
12 Healthcare Solutions automated drug management system
13 brochure at Page 9.

14 That is the entire reference in the Stec report
15 to the entire issue referencing not conversations with
16 people, not interviews with witnesses but a brochure that
17 was on the website from Day One of the lawsuit.

18 THE COURT: And, Mr. Jacobs, do you find more
19 in the Stec report than what Mr. Fabricant is saying?

20 MR. JACOBS: Well, I wonder why that report was
21 not produced during the course of discovery, Your Honor, if
22 it was on the website. Usually these types of facts are
23 provided via discovery in the case. Certainly, if you look
24 at the Stec report, there are many, many references, Your
25 Honor, to his conclusions being based on a number of

1 conversations.

2 Now, I would agree with Mr. Fabricant that I
3 don't believe that that particular sentence was tied in the
4 report to a discussion. But if you look at the report
5 globally, he talks about all of the discussions he had
6 with a number of people to derive and come up with the
7 opinions and the conclusions that he represents in the
8 report.

9 THE COURT: Okay. Thank you.

10 MS. ONDRICK: And, Your Honor, I don't believe
11 that that particular document that he is even referencing
12 makes the statement that it's an alternative to the
13 PickRing.

14 THE COURT: Okay. Thank you. I have enough on
15 all of that at this point.

16 Here is what we're going to do. We're going to
17 continue the schedule as it is so whatever rebuttal reports
18 that you were all working on for May 28th, those are still
19 due on May 28th.

20 If we decide to allow McKesson to add the
21 additional claims, then obviously you will hear that from
22 us. And I will understand that we'll need to do some kind
23 of modification, it's unclear yet as to how extensive but
24 some modification to permit some type of supplemental expert
25 reports which may have some impact on the termination of

1 expert discovery.

2 In no event, however, will any of this have any
3 effect on the trial date. The trial date is going to stay
4 what it is. So continue as you were. I'm going to take
5 this issue under advisement; and you will hear from us in
6 short order.

7 MR. JACOBS: Thank you, Your Honor.

8 MR. FABRICANT: Thank you. Your Honor, may I
9 just raise a different issue for one second?

10 THE COURT: Yes.

11 MR. FABRICANT: We received a letter last
12 evening actually after our day was over for me which added
13 some additional cases and addressed the motions we had the
14 other day before Your Honor.

15 THE COURT: Yes, I saw that. Did you want to
16 respond to that?

17 MR. FABRICANT: Well, I don't believe the cases
18 change what was stated at the oral argument with respect to
19 the issue of what you do when you look at a document which
20 makes no reference whatsoever within its four corners to
21 other documents in a situation. I would ask the Court if
22 the Court would like to give us until Tuesday to send in a
23 letter in response, if Your Honor wants a response.

24 THE COURT: I'll leave it up to you, but you
25 have until the end of the day Tuesday, but you have got to

1 keep it to two pages, just as the folks on the other end
2 did; okay?

3 MR. FABRICANT: Thank you, Your Honor.

4 THE COURT: Okay. In the meantime, everyone
5 have a good weekend.

6 MR. JACOBS: You do the same, Your Honor. Thank
7 you.

8 THE COURT: Thank you, all. Good-bye.

9 MS. ONDRICK: Thank you, Your Honor.

10 (Telephone conference ends at 11:38 a.m.)
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